APPEAL NO. 111924
FILED FEBRUARY 22, 2012

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on November 8, 2011, in[City], Texas, with [hearing officer] presiding as hearing officer. With regard to the four disputed issues before her, the hearing officer determined that: (1) the appellant's (claimant) compensable injury of [date of injury], extends to L5-S1 disc herniation, lumbar radiculopathy, thoracic sprain/strain, and right shoulder rotator cuff impingement; (2) a subsequent designated doctor should not be appointed to address extent of injury; (3) the claimant reached maximum medical improvement (MMI) on December 14, 2010; and (4) the claimant's impairment rating (IR) is 3%.

The claimant appealed, contending a second designated doctor should be appointed and that his MMI date should be August 16, 2011, with a 16% IR as assigned by a doctor selected by the treating doctor acting in place of the treating doctor. The respondent (carrier) responded, urging affirmance.

The hearing officer's determination that the claimant's compensable injury extends to L5-S1 disc herniation, lumbar radiculopathy, thoracic sprain/strain, and right shoulder rotator cuff impingement has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The evidence established that the claimant worked for a billiard factory. The claimant testified that on [date of injury], he was helping carry a pool table when a dog attacked him, causing him to twist and quickly drop his end of the pool table. The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant's treating doctor, in a report dated April 14, 2011, diagnosed a lumbar disc herniation, lumbar sprain/strain, thoracic sprain/strain, cervical sprain/strain, shoulder sprain/strain and rotator cuff impingement syndrome and stated that the claimant had not reached MMI. It is undisputed that the carrier has accepted a cervical and lumbar strain.

APPOINTMENT OF A SECOND DESIGNATED DOCTOR

The hearing officer's determination that a subsequent designated doctor should not be appointed to address extent of injury is supported by sufficient evidence and is affirmed.

MMI AND IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides in pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical record and the certifying examination and the doctor assigning the IR shall:

(A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;

(B) document specific laboratory or clinical findings of an impairment;

(C) analyze specific clinical and laboratory findings of an impairment;

(D) compare the results of the analysis with the impairment criteria and provide the following:

(i) [a] description and explanation of specific clinical findings related to each impairment, including [0%] [IRs]; and

(ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of the [Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides)]. The doctor's inability to obtain required measurements must be explained.

[Dr. S], the designated doctor, was initially appointed to determine MMI, IR, return to work, and extent of injury. In a Report of Medical Evaluation (DWC-69) and narrative dated December 14, 2010, Dr. S certified the claimant at MMI on that same date with a 3% IR. Dr. S diagnosed a cervical spine sprain/strain, lumbar spine

sprain/strain and right shoulder impingement. Dr. S simply stated the claimant "has reached [MMI] as of this date, December 14, 2010." No rationale is given for that date of MMI (the date the claimant's treating doctor said the claimant was not at MMI). Dr. S stated he used the AMA Guides, assigned a 0% impairment for Cervicothoracic Diagnosis-Related Estimates (DRE) Category I: Complaints and Symptoms and a 0% impairment for Lumbosacral DRE Category I: Complaints or Symptoms. Dr. S stated the right shoulder qualifies for a 3% whole person impairment. Dr. S does not provide measurements or objective clinical findings (see Rule 130.1(c)(3)) to support his assigned 3% IR. On the extent of injury, Dr. S stated the compensable injury would be a "cervical spine strain, lumbar spine strain, and right shoulder impingement only." Dr. S's December 14, 2010, report cannot be adopted because he did not rate the thoracic sprain/strain the hearing officer found compensable and did not provide supporting figures for the 3% right shoulder rating pursuant to Rule 130.1(c)(3).

Dr. S was again appointed as the designated doctor for extent of injury on May 2, 2011. In a report dated June 6, 2011, Dr. S stated the extent of injury was "lumbar spine injury and right shoulder rotator cuff injury." This report did give right shoulder range of motion (ROM) figures. Those figures had flexion 120° (which we note would give a 4% upper extremity (UE) impairment under Figure 38, page 3/43 of the AMA Guides, extension of 50° (0% impairment Figure 38, page 3/43), 120° abduction (3% impairment Figure 41, page 3/44) 50° adduction (0% impairment Figure 41, page 3/44) and 90° internal and external rotation (0% impairment Figure 44, page 3/45). Adding 4+0+3+0+0+0=7% UE impairment which converts to a 4% (not 3%) IR in Table 3, page 3/20 of the AMA Guides. This report cannot be adopted because it does not include a rating for the thoracic sprain/strain and a rating for the cervical strain. Additionally, this report contains an incorrect calculation on the right shoulder loss of ROM impairment.

In response to a letter of clarification and addendum dated September 23, 2011, Dr. S amended his opinion on the extent of injury to include lumbar spine injury, right shoulder rotator cuff injury, thoracic strain, lumbar strain with radiculopathy and right shoulder impingement.

The claimant was also examined by [Dr. R], a doctor selected by the treating doctor acting in place of the treating doctor. In a DWC-69 and narrative dated August 16, 2011, based on an examination of that date, Dr. R certified the claimant at MMI on August 16, 2011, with a 16% IR. Dr. R stated that as a result of his evaluation and with a review of medical records/information provided, he determined the claimant reached MMI on August 16, 2011. Dr. R calculated the 16% IR based on 10% impairment based on "[DRE] Category III: Radiculopathy-specific to verifiable electrodiagnostic findings" which we interpret to mean DRE Lumbosacral Category III: Radiculopathy. The description and verification of that category on page 3/102 of the AMA Guides states

that the "patient has significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of greater than 2 [centimeter (cm)] above or below the knee, compared to measurements on the contralateral side at the same location." The claimant does not meet that requirement. Dr. R in his report shows a 1 cm difference at the "Quad/Thigh" and states that there "was no significant disparity between the left and right extremities which would indicate evidence of atrophic change due to prolonged nerve damage." Dr. R notes the deep tendon reflexes were graded as +2/+2 bilaterally. Dr. R rated the "cervico-thoracic" spine as 0% impairment DRE Cervicothoracic Category I: Complaints or Symptoms. Dr. R rated the claimant's right shoulder as 12% UE which translates into a 7% whole person. He then combines the 10% Lumbosacral (DRE Category III) with 7% loss of ROM for the right shoulder to arrive at the 16% IR. Dr. R, although saying a ROM report and IR worksheet are attached, does not give any measurements to support his right shoulder 12% UE rating. Dr. R also does not specifically rate a thoracic sprain/strain which has been found to be part of the compensable injury. Dr. R's certification cannot be adopted for the following reasons: (1) he did not rate the entire compensable injury, namely the thoracic sprain/strain; (2) Dr. R's report does not support a 10% IR for DRE Lumbosacral Category III: Radiculopathy because there are no significant signs of radiculopathy as set out on pages 3/102 and 3/109 of the AMA Guides; and (3) Dr. R does not give loss of ROM measurements as required by Rule 130.1(c)(3).

Also in evidence is a report from [Dr. O], the carrier selected post-designated doctor required medical examination (RME) doctor, who, in a DWC-69 and narrative dated March 25, 2011, certified MMI on December 14, 2010, with a 2% IR. Dr. O used the correct loss of ROM tables with measurements to arrive at a 2% IR. Dr. O rated a DRE Cervicothoracic Category I: Complaints or Symptoms as 0% and a DRE Lumbosacral Category I: Complaints or Symptoms as 0%. Dr. O summarized:

In summary, on my examination on this date I would have a 2% [w]hole [p]erson [i]mpairment. [Dr. S] had given the claimant 3% impairment. This is basically just a small difference in the [ROM] I found and the [ROM] that [Dr. S] found. Therefore, it appears to me that [Dr. S]'s impairment that was given on [December 14, 2010], was in all medical probability correct. The claimant may have improved his [ROM] slightly since that time. . . .

Dr. O's report cannot be adopted because he did not rate the entire compensable injury, namely the thoracic sprain/strain. There are no other certifications of MMI/IR in evidence.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is

so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

For the reasons stated above, we reverse the hearing officer's determinations that the claimant reached MMI on December 14, 2010, and that the claimant has a 3% IR as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Because none of the certifications of MMI and assignment of IR in evidence can be adopted we remand the case back to the hearing officer for further consideration and action consistent with this decision.

REMAND INSTRUCTIONS

Dr. S is the designated doctor. On remand the hearing officer is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S is no longer qualified or available, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine MMI and the IR. The designated doctor is to rate the entire compensable injury, which includes an administratively determined L5-S1 disc herniation, lumbar radiculopathy, thoracic sprain/strain, and right shoulder rotator cuff impingement and give an opinion on MMI, which cannot be after the statutory MMI date, and an opinion on the IR in accordance with Rule 130.1(c)(3) based on the claimant's condition as of the MMI date considering the medical records, the certifying examination and rating criteria in the AMA Guides.

The parties are to be provided with the hearing officer's letter and the designated doctor's response. The parties are to be allowed to respond.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge